Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION,
Petitioner

v.

FRANCIS FORD, INC.,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF IN OPPOSITION ON BEHALF OF *AMICUS CURIAE* THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION

GLENN A. MITCHELL
STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 737-7777

Attorney For Amicus Curiae The National Automobile Dealers Association

PARRACK PRESS, WASHINGTON—1901 N. OAK STREET, ARLINGTON, VA 22209—(703) 525-6000

QUESTION PRESENTED

Whether, under the special circumstances of this case, the Federal Trade Commission abused its discretion in attempting to establish, through adjudication against one automobile dealer rather than through rulemaking, a nationwide standard for the expenses a secured party may charge to a defaulting debtor for retaking, holding, and selling collateral.*

---

* The parties in the court of appeals were the Federal Trade Commission and Francis Ford, Inc. The National Automobile Dealers Association appeared as amicus curiae in the court of appeals. This brief is filed by consent of the parties. The written consents are being lodged at the time this brief is filed.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Interest of Amicus Curiae	2
Statement	2
Summary of Argument	5
Argument	6
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

	Page
CASES:	
Abbott Laboratories v. Gardner, 387 U.S. 136	12,15
Bahat v. Sureck, 637 F.2d 1315	13
Chrysler Corp., 97 F.T.C. 107	3
Chuck Olson Chevrolet, 96 F.T.C. 37	3
County of Los Angeles v. Davis, 440 U.S. 625	16
DeFunis v. Odegaard, 416 U.S. 312	16
Ford Motor Co., 93 F.T.C. 402	3
General Motors Corp., 95 F.T.C. 825	3
NLRB v. Bell Aerospace Co., 416 U.S. 267	5,6,7,11
NLRB v. Wyman-Gordon Co., 394 U.S. 759	5,6,11
Patel v. INS, 638 F.2d 1199	12,13
Preiser v. Newkirk, 422 U.S. 395	16
Ruangswang v. INS, 591 F.2d 39	12
SEC v. Chenery Corp., 332 U.S. 194	5,7,11
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100	8
STATUTES AND REGULATIONS:	
Federal Trade Commission Act	
Section 5, 15 U.S.C. § 45	2
Section 5(m)(1)(A), 15 U.S.C. § 45(m)(1)(A)	13
Section 5(m)(1)(B), 15 U.S.C. § 45(m)(1)(B)	*passim*
Section 18, 15 U.S.C. § 57a	6,9,10

	Page
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2183	10
8 C.F.R. 212.8(b)(4)	12
16 C.F.R. 3.25(f)	3
Uniform Commercial Code § 9-504	5
MISCELLANEOUS:	
K. Davis, *1982 Supplement to Administrative Law Treatise*	13,14
40 Fed. Reg. 16,347 (April 11, 1975)	4
H.R. Rep. No. 1107, 93d Cong., 2d Sess., Reprinted in 1974 U.S. CODE CONG. & AD. NEWS	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-24

FEDERAL TRADE COMMISSION,
Petitioner

v.

FRANCIS FORD, INC.,
Respondent

On Petition for A Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION ON BEHALF OF *AMICUS CURIAE* THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Pet.App. 1a-5a) is reported at 673 F.2d 1008. The opinion and order of the Federal Trade Commission (Pet.App. 13a-73a) and initial decision of the Administrative Law Judge (Pet.App. 74a-139a) are reported at 94 FTC 564.

JURISDICTION

The judgment of the court of appeals (Pet.App. 6a) was entered on August 24, 1981. A petition for rehearing and a suggestion for rehearing *en banc* were denied on April 5, 1982. (Pet.App. 7a). The petition for a writ of certiorari was filed on July 6, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTEREST OF AMICUS CURIAE

The National Automobile Dealers Association ("NADA") is a trade association of approximately 20,000 motor vehicle dealers. NADA's members are vitally affected by the FTC decision vacated by the court of appeals because the FTC can enforce (and has announced that it intends to enforce) the principles of the decision against dealers pursuant to 15 U.S.C. § 45(m)(1)(B).

STATEMENT

1. On February 10, 1976, the Federal Trade Commission ("FTC") issued an administrative complaint pursuant to section 5 of the FTC Act, 5 U.S.C. § 45, against Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), and Francis Ford, Inc. ("Francis Ford"), a Ford dealer. On the same day, the Commission issued nearly identical complaints against Chrysler Corporation, Chrysler Credit Corporation, and a Chrysler dealer, and against General Motors, General Motors Acceptance Corporation, and a General Motors dealer. The complaint in this action charged, *inter alia*, that respondents and "other Ford repurchase dealers" violated section 5 of the FTC Act by allegedly failing to properly calculate the surplus realized from the sale of repossessed vehicles and by failing to pay the surpluses to defaulting buyers.

NADA moved immediately after issuance of the complaint to intervene in the three proceedings. The Administrative Law Judge denied NADA's petition for intervention, granting the association the right to participate only with respect to the scope of any proposed order and its effect on the repossession practices of the unnamed dealers. The Commission reviewed and affirmed this decision.[1]

Prior to the commencement of the administrative hearings, Ford and Ford Credit settled with the FTC. Ford agreed to impose upon its franchisees a formula for accounting for

---

[1] In its decision, the court of appeals found that NADA had been denied the right to intervene in the administrative action. (Pet.App. 2a). The FTC challenges this finding in its petition. (Pet. 19, n.15). As will be discussed in note 6, *infra*, the court of appeals was correct.

surpluses and deficiencies arising from the sale of repossessed vehicles. The formula does not allow dealers to charge to the defaulting debtor overhead and other indirect expenses related to the repossession.[2] The order also requires Ford to audit its dealers to determine their compliance with the order.[3]

Subsequently, the FTC settled its actions against General Motors, General Motors Acceptance Corporation and the nominal General Motors dealer and against Chrysler Corporation, Chrysler Credit Corporation, and the nominal Chrysler dealer. The orders in those cases contain provisions similar to those in the Ford agreement. They require the manufacturers to impose upon their franchisees a formula for accounting for surpluses and deficiencies arising from the sale of repossessed vehicles which does not allow dealers to charge for overhead and other indirect expenses and which requires the manufacturers to audit their dealers' compliance with the order.[4]

2. The Commission proceeded to administrative hearings solely against Francis Ford. Francis Ford had objected to the Ford settlement by a motion opposing the withdrawal of the matter from adjudication with respect to the Ford respondents. It also sought to settle the matter itself through another motion to the Administrative Law Judge. Both motions were denied.

On January 4, 1979, the Administrative Law Judge entered a decision. (Pet.App. 74a-139a). The decision was affirmed by the Commission on September 21, 1979. (Pet.App. 13a-72a). The Commission found it to be an unfair practice to charge the defaulting debtor with overhead and indirect expenses attributable to the repossession in calculating a surplus or deficiency upon the sale of a repossessed vehicle. (Pet. App. 55a-56a).

---

[2] Under its rules, the FTC determines whether to accept the tendered settlement agreement. If it accepts the agreement, it is published in the Federal Register, and interested parties may comment within 60 days. 16 C.F.R. § 3.25(f). Pursuant to the FTC rules, NADA strongly objected to the Ford consent order in extensive written comments filed with the FTC.

[3] Ford Motor Co., 93 F.T.C. 402, 406-21 (1979).

[4] The settlements occurred subsequent to the administrative hearings in this case. General Motors Corp., 95 F.T.C. 825, 831-53 (1980); Chuck Olson Chevrolet, 96 F.T.C. 37 (1980); Chrysler Corp., 97 F.T.C. 107, 139 (1981). Pursuant to FTC rules, NADA strongly objected to these orders.

Of particular significance is an attachment to the Commission decision entitled "Synopsis of Determinations for 15 U.S.C. § 45(m)(1)(B), Ford Motor Company, et al., Docket No. 9073." (*See* Pet.App. 54a-56a). The synopsis states that it is unfair and unlawful under section 5 of the FTC Act for a party to fail to account for and pay to a defaulting debtor a surplus. The synopsis also states that it is unfair and unlawful for a dealer to fail to use a specified accounting procedure which gives certain credits to the defaulting debtor and which prohibits certain charges (primarily overhead and indirect expenses) to the defaulting debtor.

3. The synopsis was prepared to apply the principles of the decision to other automobile dealers in civil penalty actions against those dealers pursuant to 15 U.S.C. § 45(m)(1)(B). (*See* Appendix to this Brief). That section provides that the Commission may commence a civil penalty action against anyone who engages in an act or practice found to be unlawful in a final cease and desist order if that person has actual knowledge that the act or practice is unlawful.

4. During the time the Commission prosecuted this case, it was also considering (and is still considering) a rulemaking proceeding concerning credit practices. 40 Fed. Reg. 16,347 (April 11, 1975). One part of the credit practices proceeding involves the value to be given to repossessed collateral in the calculation of a surplus to which the defaulting debtor is entitled or a deficiency for which the defaulting debtor is liable. All matters considered in this proceeding could easily have been considered in the rulemaking proceeding.

5. Francis Ford filed a Petition for Review of the FTC decision with the Court of Appeals for the Ninth Circuit.[8] In

[8] NADA appeared before the court of appeals as amicus curiae and presented a brief on the merits. NADA presented two arguments: (1) The Federal Trade Commission erred in holding that a secured party could not charge the defaulting debtor for the indirect expenses and costs of retaking, holding, and selling the collateral, and (2) the Commission erred in proceeding by adjudication instead of rulemaking to attempt to establish a national standard for the expenses that may be charged a defaulting debtor by the secured party.

vacating the Commission's order (Pet.App. 6a), the court held that the FTC erred in proceeding by adjudication against only one dealer to change a wide-spread industry practice. The court held that the Commission's order, in effect, rewrites Uniform Commercial Code §9-504, and therefore the agency should have proceeded by rulemaking. (Pet.App. 4a-5a).

The FTC filed a petition for rehearing and a suggestion for rehearing *en banc*. Francis Ford opposed the petition and suggestion with NADA appearing as amicus curiae. The court denied the petition for rehearing and rejected the *en banc* suggestion. (Pet.App. 7a). The FTC then filed this petition for certiorari.

6. Sometime after the decision of the court of appeals, Francis Ford went out of business. The corporation is still in existence; it has not been liquidated. However, the corporation no longer does business, according to information available to NADA.

SUMMARY OF ARGUMENT

The decision of the court of appeals is correct. It is not in conflict with any decision of this Court, but instead is supported by previous decisions of this Court. Review of the decision is not warranted.

In its petition, the FTC erroneously portrays the court of appeals decision as a radical departure from established precedent which will unreasonably burden the administrative process. That is not the case. The court merely applied a doctrine that was enunciated by this Court: The decision to proceed by adjudication or by rulemaking is one to be left to the informed discretion of the administrative agency, but there are situations where the agency's reliance on adjudication can constitute an abuse of discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Based upon that doctrine, the Ninth Circuit correctly found that the decision of the Federal Trade Commission to proceed by adjudication

against one dealer to establish a nationwide standard without observing the safeguards of rulemaking was improper.

Not only is the decision in accord with the principles enunciated by this Court, it also is in accord with the Federal Trade Commission Act. Congress granted substantive trade regulation rulemaking authority to the FTC. 15 U.S.C. § 57a. In doing so, it established vital safeguards to protect the rights of interested and affected parties. Congress would not have established such a power with important safeguards for interested persons if it had envisioned that the FTC would circumvent rulemaking through an adjudicative proceeding, the avowed purpose of which was to establish an industry-wide rule which would later be enforced against non-respondents pursuant to 15 U.S.C. § 45(m)(1)(B).

The decision is not unworkable, as claimed by the FTC in its petition. Contrary to the claim of the FTC that there must be a "bright line" between adjudicative cases and rulemaking, the doctrine that the decision to proceed by adjudication or rulemaking is to be left to the informed decision of the agency necessarily implies that each agency decision can be reviewed on its merits. For this reason, this Court has refrained from establishing a "bright line", a fact noted by the court of appeals. (Pet.App. 3a).

Finally, because Francis Ford is out of business, the circumstances of this case justify the conclusion that Francis Ford will never again engage in the acts about which the FTC complains. The case is moot and should not be reviewed by this Court.

ARGUMENT

1. The Federal Trade Commission portrays the court of appeals' decision as a major departure from prior law which will adversely affect administrative proceedings. There is no basis for the contention. The court of appeals' decision is consistent with (and correctly cites as precedent) prior decisions of this Court.

As the Federal Trade Commission states in its petition (Pet. 7), this Court has repeatedly held that the decision to proceed by adjudication or by rulemaking is one to be left to the informed discretion of the administrative agency. *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 293; *NLRB v. Wyman-*

Gordon Co., supra, 394 U.S. at 772 (Black, J. concurring); *SEC v. Chenery Corp.*, 332 U.S. at 203. However, this Court has gone on to hold that "[T]here may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion or a violation of the [Administrative Procedure] Act." *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 294. The court of appeals did not ignore the doctrine enunciated by this Court in deciding this case; it depended on it and applied it. The court carefully considered the facts of this case to determine whether the Commission had abused its discretion in proceeding by rulemaking. It determined that it had, and it vacated the decision.

If this Court's statement in *Bell Aerospace* that there may be a situation in which an agency's decision to proceed by adjudication can be an abuse of discretion is to have any meaning, it must be applied in this case. This case is a prime example of an administrative agency's abuse of the substantial power given it by Congress and of its failure to respect the safeguards of rulemaking established by Congress.

The events of this case make clear that the purpose of this proceeding was to establish a national standard for the expenses that may be charged to a defaulting debtor by the secured party upon sale of the collateral without giving interested and affected parties the rights of participation they would have in rulemaking. The Commission first settled its action against Ford and Ford Credit. The consent order imposed minimal burdens on Ford. The company's major obligation was to require its franchisees to implement a specific formula for calculating the surplus or deficiency arising from the sale of repossessed collateral. The order also required the manufacturer to audit a specified number of dealers to report to the Commission those dealers who are not utilizing the required accounting procedure. The Commission then proceeded with its adjudicative proceeding against Francis Ford, after refusing its offer to settle and after refusing the request of NADA to intervene in the proceeding.[6]

---

[6] Despite the Commission's attempt to contend in its petition that the court of appeals was wrong when it found that NADA was denied inter-

(footnote continues)

The FTC announced that its decision in the Francis Ford action would be enforced against other automobile dealers in civil penalty proceedings in the United States District Court pursuant to 15 U.S.C. § 45(m) (1) (B):

> In addition, we have appended a synopsis summarizing our holding in this matter, so as to facilitate application of the principles articulated herein to any party that may engage in similar practices, as con-

---

(footnote continued)

vention rights (Pet. 19, n.15), the court was correct. NADA applied for full intervention rights on the issues of liability and the scope of any order entered. NADA was granted only the right to participate with respect to the scope of the order despite the allegations against unnamed dealers. The Commission did invite NADA to renew its motion if the rights of NADA's members (i.e., the unnamed dealers) were not protected. However, in so ruling, the Commission made clear that NADA's intervention would only be as to unnamed dealer conduct and that the association would have no right to present evidence on the issues relating to named respondent conduct.

By allowing NADA the right to participate only with respect to the scope of the order, the FTC gave NADA no rights to protect its members. That is because under 15 U.S.C. section 45(m)(1)(B), the Commission does not enforce the terms of an *order* against non-respondents, it enforces the principles of *decisions* against non-respondents. By refusing NADA the right to participate with respect to the issues on liability, the Commission prevented NADA from participating with respect to any decisions which would later be enforced against its members. When Ford and Ford Credit settled, what little rights NADA had in the proceeding evaporated because that settlement provided for an imposition of the terms of the consent order on unnamed dealers. NADA was still concerned with the scope of any decision to be entered because of the possibility of enforcement of the principles of that decision against NADA's members. However, NADA had been denied rights to participate with respect to liability even when unnamed dealer conduct was in the case. Once unnamed dealer conduct had been removed from the case, because of the Ford and Ford Credit settlement, it was futile to apply for rights of intervention to defend Francis Ford's practices, given the Commission warning that NADA could not present evidence on named respondent conduct. This court has never required one to perform a futile act to protect its rights. *See, e.g. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100,146 n.15 (1969).

templated by 15 U.S.C. § 5(m) (1) (B) [sic]. (Pet.App. 43a).[7]

Thereafter, the FTC settled the General Motors action and the Chrysler action entering consent orders with all respondents in those actions. The consent orders required those manufacturers to impose similar accounting programs on their dealers and to establish similar reporting requirements.

The aim of the FTC throughout this whole proceeding was clear. The FTC preferred to enter consent orders with the major automobile manufacturers that required the manufacturers to impose on dealers the FTC's preferred formula for accounting for surpluses from the sale of collateral. It chose to then proceed against one dealer to establish a formula through an adjudicative proceeding. The Commission would then proceed against all dealers who refused to follow the mandated formula (and who were identified through manufacturer audits) by civil penalty actions in the United States district courts pursuant to 15 U.S.C. § 45(m) (1) (B). Through this devious process, the FTC intended to establish a national standard for an entire industry's accounting practices without meaningful participation by those most able to defend current practices—the automakers and their credit subsidiaries—and without receiving input from those most concerned and most vitally affected—automobile dealers throughout the United States.

The court of appeals saw the process used by the Commission for what it was—rulemaking through adjudication and through the use of 15 U.S.C. § 45 (m) (1) (B) which does not have safeguards designed to guarantee the rights of interested persons[8]—and the Court nullified it. This was not a revolution-

[7] In a post argument Motion for Leave to File Supplemental Memorandum Consenting to Modification of Order directed to the court of appeals (at 5-6), the FTC explained the way it intended to use the synopsis against other dealers. "It is this Synopsis of the Commission's holdings which the Commission would necessarily utilize in giving notice of a 'determination of unlawfulness' as a condition precedent to seeking civil penalties for future non-compliance by third parties."

[8] 15 U.S.C. § 57a establishes the rights of interested persons in FTC rulemaking proceedings. These rights include the opportunity for all inter-

(footnote continues)

ary doctrine. Instead, it was a proper application of this Court's holding that there may be situations in which an administrative agency's decision to proceed by adjudication instead of by rulemaking is an abuse of discretion. The court recognized this as just such a situation.

2. In its petition, the FTC charges that the court's decision was inconsistent with Congressional intent as manifested in the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.* (Pet. 12). To support this proposition, the FTC cites several cases that predate the passage of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2183 (1975). (*See* Pet. 13-14).

The Magnuson-Moss Act contained two provisions which are pertinent here. The first is section 202 of the Act (codified at 15 U.S.C. § 57a) which establishes the FTC's trade regulation rulemaking authority and which establishes rulemaking procedures in addition to those of the Administrative Procedure Act. The second is contained in section 205 of the Act (codified at 15 U.S.C. § 45(m)(1)(B)) which allows the FTC to sue for civil penalties any third party who engages in an act or practice found in a previous FTC proceeding to be unlawful upon a showing that the third party knew the act or practice to be unlawful.

The legislative history establishes that Congress regarded the rulemaking provisions of the Magnuson-Moss Act as an important change to FTC authority and procedure. The House Committee on Interstate and Foreign Commerce discussed the importance of the rulemaking procedures:

> Your committee believes these rulemaking procedures and this scope of judicial review [as contained in the Administrative Procedure Act] may be inadequate in some cases where fundamental factual premises of a rule are at issue. Because of the

---

(footnote continued)

ested persons to present their positions orally or by documentary submissions, 15 U.S.C. § 57a(c)(1)(A), and the right to cross-examine and present rebuttal under certain conditions, 15 U.S.C. § 57a(c)(1)(B).

> potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices", the committee believes greater procedural safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions described below which we believe to be more appropriate in this context then merely relying upon provisions of sections 553 and 703 of Title 5.

H.R. Rep. No. 1107, 93d Cong., 2d. Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7702, 7727.

The FTC contends that the promulgation of 15 U.S.C. § 45(m)(1)(B) reinforces its argument that it need not proceed by rulemaking if it chooses to proceed by adjudication. It states, "By enacting this provision, Congress plainly rejected the rationale of the court of appeals in the present case." (Pet. 14).

However, if Congress meant for the FTC to circumvent rulemaking through adjudication and through subsequent use of 15 U.S.C. § 45(m)(1)(B), it never would have provided specific trade regulation rulemaking authority to the Commission with specified procedures that must be followed. Of what use are such safeguards if the FTC can ignore them at will? The answer is that Congress provided trade regulation rulemaking authority and specific safeguards because it did not intend adjudication and 15 U.S.C. § 45(m)(1)(B) to be abused as it was abused in this case. This contradicts the Commission's contention that 15 U.S.C. § 45(m)(1)(B) was designed to be used to circumvent the rulemaking provisions of the Magnuson-Moss Act when the Commission deemed it appropriate and supports the court of appeals' decision in this case.

3. In its petition, the FTC contends that the court of appeals' holding in this case is "utterly devoid of precedential support." (Pet. 14). That contention is erroneous.

As already discussed, the decision is supported by the trilogy of cases relied upon by the FTC in its petition, *Bell Aerospace*, *Wyman-Gordon*, and *Chenery*. In those cases, the Court announced the rule that, in the first instance, an adminis-

trative agency does have discretion to proceed by adjudication or by rulemaking. Those same cases make abundantly clear that such discretion is not unbounded or beyond review by the courts. The Ninth Circuit took full cognizance of those cases in carefully reviewing the FTC's exercise of discretion and found ample basis for concluding that the Commission proceeded improperly. In the absence of a statutory prohibition against judicial review, the propriety of such judicial oversight has been universally recognized and accepted. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

Moreover, the decision below is an outgrowth of a previous decision in the Ninth Circuit upon which the court also relied, *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980). In that case, Patel, an alien, attempted to remain in this country pursuant to the provisions of the "investor exemption" of 8 C.F.R. § 212.8(b)(4). Patel satisfied the two expressed conditions of the regulation, but the INS refused his request based upon its decision in a previous adjudication that the investment by the alien "must tend to expand job opportunities." This requirement had originally been proposed as part of the regulation and had been abandoned.

The court of appeals nullified the decision of the INS on two grounds. First, it found that the agency should have proceeded by rulemaking. Second, it found that the INS had been sending aliens "confusing signals." *See also Ruangswang v. INS*, 591 F.2d 39 (9th Cir. 1978).

Patel is authority for the holding in this case. If anything, the FTC activities involved in this action are far more egregious than those considered in *Patel*. In *Patel*, the INS was attempting to apply, through the doctrine of *stare decisis*, a criterion established in another case. The court struck down the action because the agency was attempting to apply the adjudicative standard as a general rule.

The conduct of the FTC here goes beyond that in *Patel*. Here, the FTC agreed with Ford, General Motors and Chrysler that the manufacturers would impose an accounting standard on their dealers and would report to the FTC those who refused to abide by that standard. The FTC then sought a litigated

decision which it could then use to sue dealers who failed to comply with the accounting standard in the United States district court for a civil penalty under 15 U.S.C. § 45(m)(1)(B), just as it can sue them for violation of a trade regulation rule under 15 U.S.C. § 45 (m)(1)(A). In essence, the Commission attempted to establish a general rule that could be enforced as a trade regulation rule.[9] The court of appeals recognized the attempt and nullified it.

Finally, the FTC argues (Pet. 16) that Professor Davis in the 1982 supplement to his *Administrative Law Treatise* questioned the citation of his treatise as authority for the court of appeals' decision. It is true that Professor Davis expresses doubt that his treatise supports the broad proposition that agencies must in all circumstances proceed by rulemaking if they seek to change the law and establish rules of widespread application. But that is not what the Ninth Circuit did, and Professor Davis recognized this fact by endorsing the court's decision when limited to the unique facts involved. He wrote:

---

[9] In its petition (Pet. 15), the FTC contends that the Ninth Circuit "apparently abandoned in a subsequent decision" its holding that the INS should have proceeded by rulemaking rather than adjudication, citing Bahat v. Sureck, 637 F.2d 1315 (9th Cir. 1981). Nothing could be further from the truth. In the *Bahat* case, the Ninth Circuit specifically approved and cited as an alternative holding the decision in *Patel* that the INS should have proceeded by rulemaking:

> We also agree with Patel's alternate holding that *Heitland* [the case establishing the "expanded job opportunity" criterion] was an improper circumvention of rule making procedure. In addition to the reasons cogently set forth in *Patel*, we note that the regulations of the INS are promulgated by the Commissioner, who serves under the Attorney General of the United States, while a separate agency under the Attorney General, the Board of Immigration Appeals, adjudicates individual cases. Although we agree with *Patel*, at _____n.4 that this dual delegation does not prevent adjudicatory action, we question the authority of the BIA to amend the regulation by adjudication to include essentially the same provisions that were rejected by the Commission in promulgating the regulation. It is the Commissioner who is given the primary function of promulgating regulations. That authority should not be nullified by the adjudicatory arm of the INS.

637 F.2d at 1320 [footnotes omitted]

> The support for the Ford decision lies in the *combination of* (a) the general superiority of rulemaking over adjudication for making new law, (b) the strong fact that the question whether to adopt the new law was simultaneously under consideration in a pending rulemaking proceeding, and (c) the palpable unfairness of singling out the one dealer for prosecution and denying intervention to the association representing 3,500 dealers. Such an unusual combination of factors, all pulling together in the same direction, may justify the result reached, but not its proposition that "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application."[10]

K. Davis, *1982 Supplement to Administrative Law Treatise* § 7:25, at 183.

4. The FTC's petition contends that the court of appeals' decision is unworkable. (Pet. 16). It contends that there must be a "bright line" by which an agency can determine whether it should proceed by rulemaking or proceed by adjudication. Because the court of appeals did not establish a bright line, it is argued, the decision is incorrect. However, this Court, as recognized by the court of appeals in this case (Pet.App. 3a), has avoided drawing a bright line as to when adjudication or rulemaking may be used.

---

[10] The Commission argues (Pet. 18, n.14) that Professor Davis's support for the decision is based on factors that were not really present in this case. However, the Commission's argument is illusory. First, the rulemaking proceeding does address a question that is very similar and which is related to the issue involved here—the value to be credited to the defaulting debtor for repossessed collateral. That value depends upon the expenses incurred (the issue in this case), an issue the Presiding Officer actually considered in the rulemaking proceeding in a report the Administrative Law Judge would not admit into evidence. (Pet. App. 35a). Second, the court of appeals was correct in finding that NADA was denied intervention. See note 6, *supra*. Finally, Francis Ford was singled out. The court of appeals found that the FTC admitted that the practices about which the FTC complained were industry-wide. (Pet. App. 4a). The FTC singled out Francis Ford as the dealer against whom it would proceed to establish its rule.

The only way that a court can determine whether an agency has abused its discretion is to examine each case on its own merits. The Ninth Circuit did precisely that and correctly concluded that in the unique circumstances of this case, the FTC acted improperly.

5. The FTC claims that the court did not find an abuse of discretion and that there is no basis on which it could find an abuse of discretion. (Pet. 12-20). However, the validity of the decision of the court of appeals should not rest upon whether court's concluding paragraph uses the magic words "abuse of discretion." In concluding that the FTC exceeded its authority, the court discusses the exercise and abuse of agency discretion and the leading cases on that subject (*Bell Aerospace, Chenery,* and *Patel*). (Pet. App. 2a-4a). It is therefore disingenuous for the FTC to claim that the court did not base its decision on the agency's abuse of discretion.

Moreover, the court is correct when it stated that the FTC exceeded its authority by proceeding as it did. Administrative agencies have authority to proceed according to informed discretion. If they abuse that discretion, then they exceed that authority.

Furthermore, there was a substantial record upon which the court could base its finding that the FTC exceeded its authority in this case. What the FTC attempted to do was to create a rule without providing the safeguards established by Congress for rulemaking.[11] The court of appeals recognized this improper attempt and nullified it as an abuse of discretion. Its action was proper and entirely consistent with the Administrative Procedure Act and precedent of this Court. *See Abbott Laboratories v. Gardner, supra,* 387 U.S. 136.

6. Finally, this matter is moot. Francis Ford is out of business. The corporation has not liquidated, but it does no business.

This Court has often held that a case is moot if subsequent events make it absolutely clear that the allegedly wrongful behavior sought to be enjoined cannot reasonably be expected

[11] *See supra* pp. 6-10.

to recur. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Preiser v. Newkirk*, 422 U.S. 395 (1975); *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Francis Ford's exit from business makes it absolutely clear that it cannot engage in the allegedly wrongful behavior. This case is thus moot, and further consideration is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEIN, MITCHELL & MEZINES
1800 M Street, N.W.
Suite #1060N
Washington, D.C. 20036
(202) 737-7777

GLENN A. MITCHELL

Attorney for Amicus Curiae The National Automobile Dealers Association

September 13, 1982

APPENDIX

APPENDIX

15 U.S.C. § 45(m)(1)(B)

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.